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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

SOUTHERN UTAH WILDERNESS
ALLIANCE, UTAH CHAPTER OF THE
SIERRA CLUB,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

EARTH ENERGY RESOURCES, INC.

Intervenors,

DIVISION'S RESPONSE

TO

REQUEST FOR AGENCY ACTION

Docket No. 201009-009

Cause No. M/047/0090

The Division of Oil, Gas and Mining hereby submits its Response to the Petitioners' Request for Agency Action.

JURISDICTION AND LEGAL AUTHORITY

The Board has authority to review decisions of the Division at its informal hearings, and to review the Division's decision regarding applications to conduct mineral mining operations (Notices of Intention) pursuant to the provisions of Utah Code § 40-8-6 (2010) and Utah Admin. Code R647-5-106(17) (2010).

The Petitioners incorrectly allege that the Board has authority and jurisdiction over this appeal based on Utah Code § 40-10-14(3) (Utah Coal Act).

STANDING

Petitioners have not set forth facts sufficient to support a claim of standing to appeal the Division's decision in this matter. Specifically the Petitioners have failed to allege with specificity that any of their members have an interest in the lands or other resources that actually may be mined or adversely affected by the approval of this NOI.

Almost 6000 acres of land surround the proposed mine site that are owned by SITLA and leased to the Operator. There is no allegation that the Petitioners have any public right of access or right to use of these lands. The potential for impact to the environment beyond this leased area is not clear, and has not been alleged with any particularity. The RAA alleges the Petitioners' members use the Tavaputs Plateau but does not allege how the approval of this 200-acre mine within the 6000-acre lease will diminish or adversely impact that use in any real way that the Board could prevent or remedy. To the extent that the Petitioners generally object to tar sands development, such a general objection does not provide standing to bring this action. They must allege a harm to an interest of their members that is within the power of the Board to remedy through this suit. Absent some demonstrable injury that may result from the approval that is within the jurisdiction of the Board, there is no standing.

SUMMARY OF RESPONSE

The Petitioners allege as the general basis for this Request for Agency Action (RAA), that the Division has improperly authorized commencement of mining within the North Pit without requiring Energy Resources to provide details for the anticipated West Pit expansion. The sole issue presented by Petitioners in the RAA is that the NOI is deficient because it was approved without review of a specific mining plan for the West Pit. The Division acknowledges that the mining plan for the West Pit is not provided in any detail. However, the NOI as approved does not authorize mining at the West Pit prior to submitting additional information. It

is anticipated that the experience gained from operation of the first pit may modify the design of the second pit. The Division did consider the potential for expansion in calculating the amount of bond to be provided, but specifically advised the operator that the mine plan for the West Pit will need more details and will need to be approved prior to the expansion and commencing mining operations there¹. Approval of an NOI based on an initial mine plan with anticipation of future expansion is routine and is not a violation of any provisions of the Utah Mined Land Reclamation Act (Utah Code §§ 40-8-1 through 23 (2010)), nor the rules governing large mineral mining operations, Utah Admin. Code R647-4-101 to 122 (2010).

This argument is a new and different objection to this NOI than those alleged by these Petitioners previously.² Petitioners allege that they do not waive "any other arguments it may raise before the Board after a complete review of the certified administrative record." However, the Petitioners have had an abundance of opportunities to make a complete review of the administrative record: they were given notice of the tentative approval and filed objections which were responded to by the Division; they filed objections to the final decision and were provided an informal hearing at which their objections were responded to by the Division. At no time have the Petitioners not had access to the complete administrative record. There is no requirement or reason to 'certify' the administrative record.

The Petitioners are required to state in their Petition before the Board, the factual and legal basis for their claims of error, and the basis of their request for relief (Utah Admin. Code R641-104-133 and R647-5-106(17)). This RAA does not set forth the arguments that were raised

¹ The permit does not authorize mining in the West Pit without Earth Energy submitting a more detailed plan in an amendment to the NOI (see Exhibit E).

² At the informal conference the Petitioners argued for the first time that the Division's requirements for a permit to conduct mineral mining at Utah Code §§ 40-8-1 to 23 (2010) and in Utah Admin. Code R647-4-101 to 122 are inappropriate and inadequate for granting a permit to mine tar sands, and that the Division should apply the rules applicable to coal mining. The written request for an informal hearing alleged that there were six specific deficiencies in the NOI application. All of these alleged deficiencies were addressed by the Division at the informal hearing and the Director's decision specifically found that they did not warrant denying the permit or revising the Division's decision to approve the NOI.

and answered in the earlier objections and informal hearing. Petitioners' claims are limited to the claims set forth in their RAA. Accordingly, this Response will only address the issue raised in the RAA. The Division objects to any attempt by Petitioners to argue or introduce testimony or evidence in support of objections to this NOI that have not been pled in the Petition.

PROCEDURAL HISTORY

The Division does not disagree with the presentation of the procedural history as set out in the Request for Agency Action. The NOI was initially submitted to the Division by Earth Energy on September 28, 2007. Prior to submitting the request the operator had been conducting limited operations at this location pursuant to a small mine NOI.³

The NOI for the large mine operation was reviewed, revised, resubmitted and on May 20, 2009, determined complete and tentatively approved by the Division. Public notice was given in order to receive public comment on the tentative decision as required by Utah Admin. Code R647-4-116. In response, comments were received from Western Resource Advocates (WRA) on July 2, 2009. The Division notified WRA that since the NOI was already conditioned upon obtaining the necessary permits from the Utah Department of Environmental Quality (DEQ) (from Divisions of Air and Water Quality) and/or the U. S. Environmental Protection Agency, that the Division determined not to hold a hearing.⁴ WRA was also advised that an opportunity to make this and other objections to the final decision on the NOI would be afforded WRA after the final decision was made. (See letter of July 7, 2009, Exhibit A) The Division issued its final approval of the NOI on September 21, 2009, (Attached Exhibit B) and received a request for an informal administrative review on October 13, 2009. (Attached Exhibit C). An informal hearing

³ The small mine operations were primarily for the purpose of evaluating the proposed mining and recovery methods for these tar sands.

⁴ Rule R645-8-116(2) provides that any person or agency may file written protest during the comment period, and Rule R645-8-116(4) provides that "if written objections of substance are received" by the Division during the response period a hearing shall be held. The Division advised WRA that it did not consider the written comments to be "objections of substance" since the permit was already subject to obtaining the DEQ permits. WRA did not contest nor appeal the Division's determination that a hearing was not required.

was held before the Division Director, John Baza, on November 23, 2009, and on December 22, the Director issued his decision upholding the Division's approval of the NOI. (Attached Exhibit D). At the request of WRA the Division issued a letter to clarify that the decision approving the NOI was conditional upon Earth Energy obtaining necessary air and water quality permits, and that the permit did not authorize mining in the West Pit without submitting a more detailed plan in an amendment to the NOI (Exhibit E). This appeal of that decision was timely filed.

STATEMENT OF FACTS

The Division does not contest the Petitioner's Statement of Facts. The mine is located within a larger study area consisting of about 2,255 acres that is part of the lease of 5,930 acres from the School and Institutional Trust Lands Administration (SITLA).⁵ The initial mine development as proposed and detailed in the NOI will be at the 62-acre North Pit. Earth Energy does anticipate development of the West Pit after the North Pit is mined. The details of the West Pit development are conceptual in nature at this time. The mining at the North Pit will remove 7.9 million cubic yards of material in order to recover the tar sands. Applying a bulkage factor of 1.3, mining at the North Pit will generate 9.7 million cubic yards of overburden, inter-burden and waste that will be placed in the pit in accordance with the mine plans. The Pit will then be re-contoured, covered with previously saved topsoil and revegetated.

In addition, the Division alleges as follows:

1. The mining is expected to remove about 1.9 to 2.6 million tons of material per year at the north pit and mining is expected to continue at the North Pit for about five years before Earth Energy will need to commence mining operations at the West Pit. (NOI at page 14-15)

2. Before allowing mining in the West Pit, the Division will require amendments to the NOI to provide more details concerning the design of the pit, the location and design of the

⁵ The mine is located on the border of Grand and Uintah County, and although the lease is state school trust lands the lease is adjacent to federal and tribal lands

overburden storage areas, and drainage and storm water discharge control plans and other aspects of the mine plan. (Exhibit E)

ARGUMENT

The Petitioners arguments on appeal are that the approval of the mine plan for the North Pit and a conceptual design of the West Pit is wrong because it will: (1) allow mining operations to be increased based on review of an amendment rather than upon review of a significant revision of the NOI; (2) allow mining to proceed based on air and water permits that will only consider a portion of the total amount of anticipated operations; and (3) will not require a properly determined amount of bonding.

Each of these arguments is incorrect. (1) No mining can occur at the West Pit without further approval, and whether the additional review is for an amendment or for a significant revision cannot be determined until an application is made. The mine plan is preliminary and may change, the West Pit may be expanded or contracted in size, new mining methods may be adopted, there may never be an application for mining the West Pit, or the rules governing how a permit revision is reviewed may change. (2) The air and water permits will consider all of the authorized emissions; there is no preference or vested right to expand emissions or to obtain approval for a West Pit as a result of the NOI approval. The only emissions that can occur under the current permits are those related to the approved North Pit operations. (3) The amount of bonding required may be larger than necessary, but posting the excessive amount of bonding does not create a right to expand or require a lesser level of review.

Utah Code § 40-8-18(1)(a) (2010) provides "An operator conducting mining operations under an approved notice of intention shall submit to the division a notice of intention when revising mining operations." Utah Code § 40-8-18(2)(a) 2010) provides that "the notice of

intention to revise mining operations will be designated as an amendment to the existing notice of intention by the division, based on rules promulgated by the board " Utah Admin. Code R647-4-119 Amendments. states "1. An amendment is an insignificant change to the approved notice of intention. The Division will review the change and make the determination on a case-by-case basis".

If the revision is not an amendment; i.e. is not an insignificant change, then Utah Admin. Code R647-4-118 provides:

1 In order to revise a notice of intention, an operator shall file a Notice of Intention to Revise Large Mining Operations. This notice of intention will include all information concerning the revision that would have been required in the original notice of intention.

2. A Notice of Intention to Revise Large Mining Operations, . . . will be processed and considered for approval by the Division in the same manner as an original notice of intention. The operator will be authorized and bound by the requirement of the existing approved notice until the revision is acted upon and any revised surety requirements are satisfied. Those portions of the approved notice of intention not subject to revision will not be subject to review under this provision."

As was expressly reiterated to Petitioners after the informal conference, it is a condition of this NOI that mining on the West Pit will not be allowed without a revision. So the operator is required to and will file a revised NOI prior to mining the West Pit. Whether the revised NOI is reviewed as an amendment or a new permit will be based on the facts at the time.⁶

It is unlikely that adding a 37-acre pit would be considered "an insignificant change" to the approved NOI. If it is not considered an insignificant change, it will be reviewed exactly like a new permit. The Division's determination that it 'is' or 'is not' an amendment will be subject to Board review at that time. It is premature to raise this as an issue now, since the rules make

⁶ Statements allegedly made 'off the cuff' by a staff person at the informal conference do not determine the test. Even if there were an informal 50% size guideline, the language of the rules control and supercede any informal policy or statement. Most importantly the test is to be applied to the revised NOI when it is filed based on the facts that exist then not based on a conjecture as to NOI that may be filed.

clear that the decision will be made when an application is received based on the facts at the time.

Until a revised NOI is approved, the operator is bound by the existing NOI and can continue to mine only pursuant to the approved NOI. There is no advantage to having an approved NOI if a revision is required. The review will be based on the same rules as a new permit. There is no vested right or preference based on having an approved NOI.

OTHER ISSUES

Other issues raised at the Informal Hearing and in the other requests for review should not be considered since they were not plead as part of this RAA. Nevertheless, there is no basis in law or fact for any of those claims. There is no legal basis for the Division to apply the coal rules to this mineral mine. There is no legal basis for the Division to require approval of all air quality and water quality permits prior to approval of the NOI. The NOI contains a storm water protection plan that is fully adequate to protect against storm water run-off. The NOI contains a thorough review of the potential for contamination from the chemical treatment of the ore and demonstrates that there is no risk of contamination. The mine plan and operations as described in the NOI are adequately designed to prevent damage from inadequate pit compaction, and provide for adequate reclamation and revegetation. The Petitioners have failed to plead any facts or law upon which the Board could find that the Division's approval was in error in any respect.

CONCLUSION

The Petitioners have the burden to allege and to present facts in support of the challenge to the Division's decision. The only alleged deficiency is that the West Pit was improperly reviewed and included in the NOI. The approval of the NOI with a plan for future expansion subject to further review and approval, is not only legal but is prudent. The Petitioners' claim is

without merit and having presented no other facts to support claims of error, the Petitioner's

Request to vacate the approval of the NOI should be denied.

Respectfully submitted this 9th day of February, 2010

A handwritten signature in black ink, appearing to read "Steven F. Alder", written over a horizontal line.

Steven F. Alder, (Bar No #0033)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Division's Response to Request for Agency Action, to be mailed by first class mail, postage prepaid or sent by email to the following, this 9th day of February, 2010 to:

1

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This page is a reference page used to track documents internally for the Division of Oil, Gas and Mining

Mine Permit Number M/047/0090 Mine Name PR Springs mine
Operator EARTH Energy Date _____
TO _____ FROM _____

☐ CONFIDENTIAL ☐ BOND CLOSURE ☐ LARGE MAPS ☐ EXPANDABLE
☐ MULTIPUL DOCUMENT TRACKING SHEET ☐ NEW APPROVED NOI
☐ AMENDMENT ☐ OTHER _____

Description

YEAR-Record Number

☐ NOI ☐ Incoming ☒ Outgoing ☐ Internal ☐ Superceded
Public Comments Regarding Tentative Approval
to Commence Large mine Operations
Scan # 007 7/7/2009

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ TEXT/ 81/2 X 11 MAP PAGES ☐ 11 X 17 MAPS ☐ LARGE MAP

COMMENTS: _____

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Mine Permit Number M/047/0090 Mine Name PR Springs
Operator EARTH Energy Resources Date _____
TO _____ FROM _____

☐ CONFIDENTIAL ☐ BOND CLOSURE ☐ LARGE MAPS ☐ EXPANDABLE
☐ MULTIPUL DOCUMENT TRACKING SHEET ☐ NEW APPROVED NOI
☐ AMENDMENT ☐ OTHER _____

Description

YEAR-Record Number

☐ NOI ☐ Incoming ☒ Outgoing ☐ Internal ☐ Superceded
Contititional Approval of Notice of Intentions to
Commence Large Mining Operation (NOI
Scan # 0009 9/1/2009

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

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Mine Permit Number M/647/0090 Mine Name PR Springs
Operator Earth Energy Resources Date _____
TO _____ FROM _____

☐ CONFIDENTIAL ☐ BOND CLOSURE ☐ LARGE MAPS ☐ EXPANDABLE
☐ MULTIPUL DOCUMENT TRACKING SHEET ☐ NEW APPROVED NOI
☐ AMENDMENT ☐ OTHER _____

Description

YEAR-Record Number

☐ NOI ☒ Incoming ☐ Outgoing ☐ Internal ☐ Superceded
Conditional Approval
Scan # 0010 10/13/2009

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

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Mine Permit Number M/047/0090 Mine Name PR Springs
Operator Earth Energy Resources Date _____
TO _____ FROM _____

☐ CONFIDENTIAL ☐ BOND CLOSURE ☐ LARGE MAPS ☐ EXPANDABLE
☐ MULTIPUL DOCUMENT TRACKING SHEET ☐ NEW APPROVED NOI
☐ AMENDMENT ☐ OTHER _____

Description YEAR-Record Number

☐ NOI ☐ Incoming ☒ Outgoing ☐ Internal ☐ Superceded

Informal Conference
Scan # 0001 12/22/2009

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

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Mine Permit Number M/047/0090 Mine Name PR Springs
Operator EARTH Energy Resources Date _____
TO _____ FROM _____

☐ CONFIDENTIAL ☐ BOND CLOSURE ☐ LARGE MAPS ☐ EXPANDABLE
☐ MULTIPUL DOCUMENT TRACKING SHEET ☐ NEW APPROVED NOI
☐ AMENDMENT ☐ OTHER _____

Description

YEAR-Record Number

☐ NOI ☐ Incoming ☒ Outgoing ☐ Internal ☐ Superceded

Clarification of Permitting Issues
Scan # 0012 12/29/2009

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

☐ NOI ☐ Incoming ☐ Outgoing ☐ Internal ☐ Superceded

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